

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
June 5, 2001 Session

**IN THE MATTER OF:
R.L.B., DOB: 8/17/86, J.W.B., DOB: 8/3/88, D.L.B., DOB: 7/23/91, AND
J.L.B., DOB: 2/20/93
CHILDREN UNDER 18 YEARS OF AGE**

**An Appeal from the Juvenile Court for Madison County
No. 31-27, 060 Christy R. Little, Judge**

No. W2001-00367-COA-R3-JV - Filed August 1, 2001

This case involves the termination of parental rights. The children, four boys, were removed from the custody of their mother and father after reports of domestic violence by the father. While the boys were in the protective custody of the State, allegations surfaced that they had been subjected to sexual abuse by the mother, as well as physical abuse by the father. The trial court terminated the parental rights of mother and father in all four boys, finding willful abandonment and that the conditions leading to removal persisted and were unlikely to abate. On appeal, we affirm, finding that the trial court's decision is supported by clear and convincing evidence.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Marcus M. Reaves, Jackson, Tennessee, for the appellants, R.B. and M.B.

Paul G. Summers, Attorney General and Reporter, Daryl J. Brand, Associate Solicitor General, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

This case involves the termination of parental rights. There are four boys involved: Randall B. ("Randall"), born August 17, 1986, James B. ("James"), born August 3, 1988, David B. ("David"), born July 23, 1991, and Jerry B. ("Jerry"), born February 20, 1993. The natural parents are R.B. ("Father") and M.B. ("Mother"). Mother has another son, Earnest S. ("Earnest"), born October 25, 1982, who has now reached the age of majority. Mother's parental rights in Earnest are not at issue in this appeal.

This family first came to the attention of the Tennessee Department of Children's Services ("DCS")¹ in 1989 after DCS received reports of bruises and injuries to the boys. In the ensuing years, DCS received numerous calls about the family, usually involving domestic violence, violence towards the children, and alcohol abuse by Father. In December 1993, the Sheriff's office investigated an incident in which Father reportedly struck and kicked Earnest, struck Randall, and physically attacked Mother while she was holding Jerry, who was then an infant. Finally, in March 1994, DCS filed a petition to remove the boys² from Mother's and Father's custody. DCS asserted in its petition that Father had a drinking problem, and that his drinking constituted a threat to the boys' safety. The petition noted the December 1993 incident, and asserted that both Mother and Father struck the children, often using wooden boards, and that Mother's and Father's home was so roach-infested that it constituted a threat to the boys' safety.

The trial court issued an order granting the DCS petition to remove the boys from Mother's and Father's custody. Temporary legal custody of all five boys was granted to the State. Physical custody of Earnest was granted to his biological father, Randall was placed in a foster home, James was placed with one of Father's brothers, and David and Jerry were placed jointly with another of Father's brothers. Mother and Father were granted unsupervised visitation with Earnest on Saturdays, and unsupervised visitation with the remaining boys whenever it could be arranged. No overnight visits were allowed. The trial court's order required Mother and Father to continue obtaining services at the Carl Perkins Child Abuse Center. Father was required to attend Alcoholics Anonymous ("AA") and obtain alcohol and drug assessment and counseling at the West Tennessee Behavioral Center. Mother was required to obtain counseling at the West Tennessee Behavioral Center, as recommended by its staff.

In February 1995, physical custody of Earnest was granted to the State, and he was placed in foster care. The trial court set regular visitation schedules for Mother and Father with all five boys. The trial court continued to require that Mother and Father obtain counseling and substance abuse treatment, as set forth in its original order. In addition, the trial court ordered Father to obtain a psychiatric evaluation to determine if he needed prescription medication.

In April 1997, counsel for Mother and Father withdrew from representing them, stating that he could no longer represent both Mother and Father because they planned to divorce. By this time, Earnest had been placed back in his biological father's home. Randall was placed at Youth Town. The three youngest boys remained with Father's brothers, as stated in the original order.

¹ In 1996, DCS was established in an effort to consolidate the services provided to children by multiple state departments, including those provided by the Department of Human Services ("DHS"). *See* 1996 Tenn. Public Acts 1079, § 3. In this case, we refer to DCS, even though DHS handled this matter prior to 1996.

² In its petition, DCS did not seek to remove Earnest from Mother's custody. The order granting DCS's petition indicates that "E.S.," presumably Earnest's natural father, had filed a petition to remove him from Mother's custody, and that the petitions were consolidated by agreement.

On November 5, 1998, DCS filed a petition to terminate Mother's and Father's parental rights in Randall, James, David, and Jerry.³ The petition alleged that Mother and Father had abandoned the boys by willfully failing to visit them or willfully failing to provide support for them during the four months preceding the petition. It also asserted that the boys had been removed from Mother's and Father's custody for more than six months, that the conditions leading to the boys' removal persisted and were unlikely to abate, and that continuation of the child-parent relationship hindered the boys' chances of early integration into a safe and stable home. It also alleged that Mother and Father had failed to comply with the requirements of the permanency plans developed by DCS. DCS asserted in the petition that it was in the boys' best interest that the parental rights of both Mother and Father be terminated. In response, Mother and Father filed an answer denying the allegations, as well as a petition seeking return of the boys to their custody. Their petition alleged that they had made every effort to comply with the requirements in the permanency plans, and that DCS had willfully refused to assist them in obtaining visitation with the boys. DCS denied these allegations. On January 5, 1999, a guardian ad litem, Roger Staton, was appointed to represent the interests of the four boys.

A bench trial was held on April 27, 1999. The attorney for DCS, Barbara MacIntosh, questioned the DCS case manager, Elizabeth Mayes, at the trial. Mayes testified that DCS first opened a case file on Mother and Father in 1989 after receiving reports of bruises and injuries to the boys. Mayes testified that, over the next five years, DCS received over fifty reports about problems in Mother's and Father's household, at times as many as four or five calls a month. The calls usually involved allegations of domestic violence and violence towards the children, often fueled by Father's drinking. Mayes said that the December 1993 incident, in which Father allegedly struck two of the boys and physically fought with Mother, finally led DCS to seek removal of the children.

Over the next five years, DCS maintained contact with Mother and Father, mostly by telephone. Mayes testified that Mother and Father attended some of the review hearings and staffings. The plans of care developed by DCS required Mother and Father to obtain individual counseling regarding their parenting skills, as well as marital counseling. In addition, Father was to attend AA meetings. Mayes testified that Father received counseling, but Mother reported to DCS in 1997 that Father continued to drink and was abusive. Mayes noted that Mother had Father arrested for domestic assault in August 1997, but later dropped the charges. She testified that Mother and Father had difficulty maintaining a stable home, observing that they had moved four times in the past year, and said that they also had problems with money management. She said that, while the children had been in State custody, workers from the Carl Perkins Child Abuse Center had brought food for their home and had provided Christmas gifts for them to give the boys.

Mayes testified that, during the four months prior to the filing of the petition, Mother and Father made no visits with Randall or James. Mayes said that she did not have knowledge of whether Mother and Father had visited the younger boys, David and Jerry, during that time period, because they lived in the Tennessee Baptist Children's Home at that time. Mayes denied that Mother

³ DCS did not attempt to terminate Mother's parental rights in Earnest.

had called her to arrange visits prior to the filing of the DCS petition to terminate parental rights, and denied telling Mother that visits could not be arranged.

Mayes testified that some of the boys had special needs. Randall was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and Tourette’s Syndrome. James and David were both diagnosed with ADHD, and both were classified as mildly retarded. Mayes stated that Jerry had not shown any significant developmental problems.

Mayes testified that Randall had the most serious problems. She said that Randall had told her that Mother sexually abused him. He described Mother trying to get him to take baths with her, and said that she pulled on his genitals, causing pain. Mayes said that James had related similar events to a counselor and to an uncle, and said that David had stated that he was afraid of being hurt when taking a bath with Mother. Mayes testified that, after the allegations of sexual abuse surfaced, DCS allowed Mother and Father only supervised visits with the boys. She said that while Mother and Father were separated, Father brought to DCS a picture of Mother undressing, with only panties on, about to get in the bathtub with one of the boys, in an effort to prove that Mother took baths with the boys and had sexually abused them.

Nancy Madden, family program director for the Tennessee Baptist Children’s Home, testified that Mother and Father had not visited David and Jerry since June 1998, over four months prior to the filing of the petition in November 1998. However, Madden acknowledged that her records indicated that Mother called in late July 1998, to schedule a visit on August 2, and that Mother was told to call DCS to arrange the visit. Madden’s office received a call from DCS stating that Mother had requested a visit, but the August 1998 did not occur.

Madden testified that David and Jerry had both improved significantly during their stay at the children’s home. She said that when David first came to the children’s home, he was aggressive and acted inappropriately at school. Now, Madden testified, David was an honor roll student and behaved very well. She noted that Jerry first came to the children’s home when he was four years old, and that he was not yet potty trained. Madden testified that Jerry had since become potty trained and, like David, made good grades and behaved well in school. She felt that both children needed permanency, and that it was in their best interest to terminate Mother’s and Father’s parental rights.

Several witnesses testified on behalf of Mother and Father. Rev. Jeff Smith, assistant pastor of the church attended by Mother and Father, testified that he had known them for a year and a few months. He said that he and his wife had eaten dinner at Mother’s and Father’s home, and had occasionally socialized with them, and that they appeared to have a fine, normal home. He was aware that Father had had a drinking problem in the past, and he felt that Father had solved his problem. Father’s brother, Jeffrey B., testified that he had not seen Father drink alcohol in the past two or three years.

Earnest, sixteen years old, testified in the trial judge’s chambers. Earnest had not lived with Mother and Father since he was six years old. He recalled that, during visits, Mother and Father had

treated him “just fine,” and that they always had food to eat. He said that Mother and Father disciplined him by grounding him or spanking him. He testified that he had spent time at Mother’s and Father’s house during spring break a few weeks earlier, and that he had a “bunch of fun” and was treated “just fine.”

Mother testified on her own behalf. She said that, approximately four months prior to the petition to terminate, she had called Mayes at DCS to request visits with David and Jerry at the Tennessee Baptist Children’s Home. Mother asserted that Mayes told her that she could not visit the children. She said that she left several messages for Mayes, and Mayes did not respond. Despite this, Mother said that she and Father had visited David and Jerry approximately four months prior to DCS filing its petition. As to James, who lived with Father’s brother and his wife in Mississippi, Mother admitted that she had not gone to visit him for approximately a year and a half. She said that she saw him on one occasion about a month prior to trial, at Father’s grandmother’s funeral. When asked why she and Father had not been to see James in so long, Mother said that it was because she did not get along with Father’s brother’s wife. Mother said that she and Father last visited with Randall about six months prior trial, when a social worker brought him to a McDonald’s restaurant.

Mother testified that she accepted food and gifts from the Carl Perkins Child Abuse Center, but that she never asked for them. She said that workers at the center simply brought things to her and Father. She denied ever sexually abusing any of her sons. Mother admitted that she had Father arrested for physically assaulting her in August 1997, but said that she and Father had not had any problems since then. On cross examination by Ms. MacIntosh, Mother amended her answer to say that she and Father had not had marital problems for the past three or four months prior to trial.

Father also testified on his own behalf. He asserted that the last time he used alcohol was a little over two years prior to the trial. He acknowledged that he had attended AA meetings in the past, soon after the children were removed, but did not say whether he was attending them as of the date of the trial. He acknowledged that he suffered from depression during 1997, while he and Mother were experiencing marital problems, and that he had attempted to commit suicide.

Father testified about the picture of Mother undressing in the bathroom and about to enter the bathtub with one of the boys. He said that the picture was taken while he and Mother were separated, and he blamed his brother-in-law or his mother, saying they were always trying to hurt Mother. He denied that he took the picture in an effort to prove that Mother had sexually abused the boys. He also denied that he physically abused Mother in August 1997, but admitted that she had him arrested for domestic assault. He maintained that Mother’s family had put her up to it, and attributed their marital problems to “family meddling with our marriage.” Father denied ever hitting any of the boys. He said that in December 1993, when Mother called the police and told them that he had hit Earnest in the face with a board and hit Randall in the nose, Mother was lying because her family had put her up to it.

The trial court also heard testimony from the Guardian Ad Litem, Roger Staton. Staton described meeting with the foster parents for David and Jerry, characterizing them as “loving

parents,” and observing that the boys were normal, progressing well, and happy where they were. He said that he had met with these foster parents on more than one occasion, both before and after the petition to terminate was filed, and confirmed that Mother’s and Father’s most recent visit with David and Jerry prior to the filing of the petition was well over four months prior to filing. Visits by Mother and Father, the foster parents said, were short and perfunctory. Staton said that the foster parents want to adopt David and Jerry.

Staton also met with William and Sherry B., Father’s brother and his wife, who were foster parents to James. Staton said they denied preventing Mother and Father from seeing James, and in fact were upset that Father had not come to see James’s baseball and soccer games. Staton said that William and Sherry B. wish to adopt James.

Staton described gently asking James about the allegations of sexual abuse by Mother. When asked, Staton said, James “was very ashamed. . . . His face turned kind of red and he put his head down and he didn’t want to talk about it.” Staton said that James recanted the story of Mother sexually abusing him in the bathtub and then “he just clammed up.”

Staton also said that he visited Randall in Nashville, and characterized him as “a victim of the system as well as a victim of his mom and dad.” Staton testified that Randall has been bounced from foster home to foster home. Staton described a seriously troubled boy who had repeatedly attempted suicide, had exhibited explicit sexual behavior such as masturbating in public and sexually assaulting girls, and had engaged in violent behavior toward foster families. Staton said that Randall told him that he was “just tired of . . . everything that’s going on.” Staton said that he asked Randall about the sexual abuse allegations. Staton said that Randall, who was seven years old when removed from his parents’ custody, described sexual abuse more profound than Mother fondling the boys’ genitals while in the bathtub with them. Randall described Mother with him, James, and Earnest in a bedroom, all naked. Randall indicated that Mother would fondle their genitals until they became erect and then put each boy on top of her to have intercourse. Randall was apparently physically unable to have intercourse with his mother, but described in graphic detail seeing Earnest and his mother engaged in intercourse. Staton said that Randall’s recounting of these events was “in too good of detail” not to be believed. He said that Randall would need long term psychiatric care in a stable environment.

Staton also interviewed Mother and Father about their visitation with the boys, and he testified that their answers during his interview conflicted with their testimony in court. Staton said that when he interviewed Mother and Father in January 1999, they made no mention of visiting Randall in a McDonald’s restaurant six months prior to trial, which would have been in November 1998, approximately the time the petition to terminate their parental rights was filed. He said that, in his January 1999 interview with them, Mother and Father said that it had been “over six months” since they had seen Randall. They confirmed to him that they had not visited James in over a year and a half. Staton noted that Mother continued to flatly deny that any sexual abuse had occurred, and therefore had obtained no counseling for it and had taken no other measures to prevent future

episodes. Staton stated that, in his opinion as Guardian Ad Litem, it was in the boys' best interest that Mother's and Father's parental rights be terminated.⁴

The trial court issued its final order on June 1, 2000. The trial court found clear and convincing evidence that Mother and Father had willfully abandoned the children by failing to visit with them during the four months preceding the filing of the petition; that Mother and Father willfully failed to financially support the children; and that conditions leading to the boys' removal persisted and were likely to continue, and that continuation of the parent-child relationship would greatly diminish the boys' chances of early integration into a safe and stable home. The order notes that Mother and Father had substantially complied with the requirements in DCS's permanency plans, to the best of their abilities. The trial court concluded that termination of Mother's and Father's parental rights was in the boys' best interest. Consequently, the trial court terminated Mother's and Father's parental rights. From this order, Mother and Father now appeal.

On appeal, Mother and Father contend that the trial court erred in terminating their parental rights. They argue first that there was not clear and convincing evidence that they had willfully failed to visit the boys in the four months prior to the filing of the petition and had willfully failed to support them. Second, they contend that it was not in the children's best interest to terminate parental rights.

Parents have a fundamental right in the care, custody, and control of their children. *See Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994). This fundamental right is not absolute, however, and may be terminated under limited circumstances. *See In re Swanson*, 2 S.W.3d 180, 187-88 (Tenn. 1999). The circumstances under which parental rights may be terminated are set forth in Tennessee Code Annotated § 36-1-113. Section 36-1-113(c) states that termination of parental rights must be based on:

- (1) A finding by the court by clear and convincing evidence that the grounds for termination or [sic] parental or guardianship rights have been established; and
- (2) That termination of the parent's or guardian's rights is in the best interests of the child.

Tenn. Code Ann. § 36-1-113(c) (Supp. 2000). Section 36-1-113(g) sets forth seven separate grounds for termination of parental rights. It states that termination may be based on "any" of those grounds. Tenn. Code Ann. § 36-1-113(g) (Supp. 2000). The grounds include:

- (1) Abandonment, as that term is defined in Tennessee Code Annotated § 36-1-102 (section 36-1-113(g)(1));

⁴No objection was made at trial to the admissibility of the testimony of the DCS case manager, Elizabeth Mayes, or the testimony or report of the Guardian Ad Litem, Roger Staton. Likewise, no issue was raised in this appeal regarding the admissibility of the guardian ad litem report or the testimony of Mayes or Staton.

(2) Substantial noncompliance with the child's permanency plan (section 36-1-113(g)(2));

(3) Removal of the child for a period of six months, where the conditions that led to removal persist, and there is little likelihood they will be soon remedied, and continuation of the parent-child relationship greatly diminishes the child's chances of early integration into a permanent and stable home. (section 36-1-113(g)(3)).

In the case at bar, the trial court found clear and convincing evidence that Mother and Father had abandoned the boys by willfully failing to visit them in the four months preceding the filing of their petition. *See* Tenn. Code Ann. § 36-1-102(1)(A)(i) (Supp. 2000). At trial, Mother and Father asserted that Mother called in July 1998, before the petition was filed in November 1998, to attempt to set up a visit with David and Jerry. This visit did not occur. It is undisputed that Mother and Father's most recent visit with David and Jerry occurred in approximately June 1998. Mother and Father asserted that they had seen Randall at a McDonald's restaurant where he was brought by a social worker, for about an hour, approximately six months before the trial. The DCS case manager, Mayes, testified that there were no visits with Randall during the four months prior to the filing of the petition, and the Guardian Ad Litem said that Mother and Father did not tell him of a visit at McDonald's when he interviewed them in January 1999. Father acknowledged that, except for the alleged visit with Randall at McDonald's, he had not seen Randall in over a year. It is undisputed that Mother and Father had last visited James over a year prior to the trial, and saw him briefly at a relative's funeral about a month prior to trial.

Thus, the trial court was faced with some dispute in the parties' testimony regarding whether Mother and Father had visited David, Jerry, and Randall at all during the four months preceding the filing of the petition, requiring a determination of the parties' credibility by the trial judge. The trial court is in a better position than this Court to judge the credibility of witnesses. *See In re Gordon*, 980 S.W.2d 372, 375 (Tenn. Ct. App. 1998). The trial court apparently did not credit the testimony of Mother and Father that some cursory visitation, or attempts to do so, occurred within the four months prior to the filing of the petition. Moreover, even if Mother's and Father's testimony regarding visitation with Randall, David, and Jerry is credited, the visitation that occurred can only be described as token.⁵ It is undisputed that no visitation, token or otherwise, occurred with James during the four months prior to filing the petition. Under these circumstances, giving due deference to the trial court's assessment of the parties' credibility, we find no error in the trial court's finding of abandonment. The trial court also found clear and convincing evidence of "persistent conditions," that is, that the children had been removed from the home for at least six months, that the conditions leading to the children's removal still persisted, that there was little likelihood that the conditions would soon be remedied, and that the continuation of the parent-child relationship greatly diminished the children's chances of early integration into a safe, stable, and permanent home. Tenn. Code Ann.

⁵Tennessee Code Annotated § 36-1-102(1)(C) defines "token visitation" as visitation which "constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child."

§ 36-1-113(g)(3). The record includes substantial evidence from which the trial court could conclude that Father had physically abused the children and had engaged in significant alcohol abuse. While Father acknowledges his problem with alcohol and testifies that he has addressed it, he flatly denies any physical abuse of the boys. Consequently, no steps have been taken to prevent such physical abuse if the boys were returned to his custody.

The record also includes abundant evidence from which the trial court could conclude that Mother had engaged in egregious sexual abuse of the boys, ranging from fondling to intercourse. Mother denies this outright. Giving due deference to the trial court's assessment of the credibility of the witnesses, we find no error in the trial court's implicit finding that such sexual abuse occurred. Since Mother flatly denies it, no steps have been taken to prevent the recurrence of the sexual abuse if the boys were returned to her custody.

The record also supports the trial court's conclusion that continuation of the parent-child relationship greatly diminishes the children's chances of integration into a safe, stable, and permanent home, and that it is in the children's best interest to terminate Mother's and Father's parental rights. James and David are both special needs children, both diagnosed with ADHD and classified as mildly retarded. The behavior problems and developmental delays of James, David, and Jerry have been alleviated since their placement with foster parents, and they are in position to be adopted by foster parents who appear able to love them and care for them. Randall has the most special needs, diagnosed with both ADHD and Tourette's Syndrome, and he has been most profoundly affected by his history of abuse and serial foster care, needing long term psychiatric care and placement in an appropriate facility. Stability and skilled caregivers are essential to his recovery and well-being. Termination of Mother's and Father's parental rights is clearly in the best interest of all four boys, and we affirm this finding.

The decision of the trial court is affirmed. Costs on appeal are taxed to the Appellants, R.B. and M.B., and their surety, for which execution may issue if necessary.

HOLLY KIRBY LILLARD, JUDGE